2001

The State of Utah v. Trevor Powell : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. TREVOR POWELL, Defendant/Appellant.	Case No. 20010995-CA

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. 76-6-302 (1999), IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, THE HONORABLE GUY R. BURNINGHAM PRESIDING.

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JURISDICTIONAL STATEMENT

Defendant appeals his conviction for aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999), in the Fourth Judicial District Court, Utah County, State of Utah, the Honorable Guy R. Burningham presiding. This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j) (1996 & Supp. 2001) (pour-over provision).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

Issue No. 1: Are the trial court's factual findings sufficient to support the denial of defendant's motion to suppress the identification of him as the robber?

Standard of Review: Because this claim is raised for the first time on appeal, this Court reviews the record below for plain error. *State v. Helmick,* 2000 UT 70, ¶ 8, 9 P.3d 164.

Issue No. 2: Did the trial court correctly determine that the eyewitness identification of defendant from a photo array was not impermissibly suggestive and, therefore, admissible?

Standard of Review: "Whether a pretrial photo array violates a citizen's constitutional right to due process is a question of law, which we review for correctness . . . . At the same time, however, because this question of law requires the application of the record facts to the due process standard, we incorporate a clearly erroneous standard for the necessary subsidiary factual determinations." *State v. Hubbard*, 2002 UT 45, ¶ 22, 48 P.3d 953

Issue No. 3: Did the trial court correctly deny a motion for a mistrial based on defendant's claim that the State failed to disclose allegedly exculpatory evidence?

Standard of Review: Issues specifically preserved in defendant's motion for a mistrial are reviewed for abuse of discretion. *State v. Robertson,* 932 P.2d 1219, 1230-31 (Utah 1997). Issues that defendant explicitly waived during the trial cannot be reviewed, even under a plain error standard. *State v. Bullock,* 791 P.2d 155, 158 (Utah 1989) ("[I]f trial counsel's action amounted to an active, as opposed to a passive, waiver of an objection, we may decline to consider the claim of plain error").

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Pertinent portions of constitutional provisions, statutes and rules relevant to this appeal are set forth below:

Utah Const. art. I, § 7: No person shall be deprived of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

On May 17, 2001, defendant was charged with aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999). R. 1. Defendant was bound over for trial on July 25, 2001, following a preliminary hearing in the Fourth Judicial District Court. R. 16.

On August 4, 2001, defendant filed a motion to suppress the eyewitness's identification of him as the robber. R. 30. On August 10, 2001, the trial court held a hearing on the motion to suppress. R. 208. The court denied the motion on August 22, 2001. R. 83; 209:2.

Defendant was convicted on September 6, 2001, following a one-day jury trial. R. 178-81. On October 27, 2001, defendant was sentenced to five-years-to-life at the Utah State Prison and ordered to pay $789 in restitution. R. 184-85.

STATEMENT OF FACTS[1]

Heidi Shelton gave him the benefit of the doubt. Although the man entering the salon appeared "really dirty," she thought he might be just another customer looking for a quick tan. R. 211:128, 131.

"[H]i," she said. "[W]hat is your last name?" R. 211:132.

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[1] Facts are stated in a light most favorable to the trial court's ruling denying the motion to suppress. *Salt Lake City v. Davidson*, 2000 UT App 12, ¶ 2, 994 P.2d 1283.

The man look around furtively. Then, he raised the sleeve of his jacket, revealing the handle of a knife. He told her to give him the money from the register. R. 211:133.

Ms. Shelton, a 16-year-old high school student, was understandably flustered. As she attempted to retrieve the money from the register, bills tumbled to the ground, requiring her to fumble on the floor to retrieve them. R. 211:133-34.

Despite her discomfiture, Ms. Shelton carefully eyed the man, who was only four feet away in the well-lighted waiting room. She estimated that during the three-to-four minutes the man was in the store, she looked directly at him 10-to-15 times. He wore a stocking cap, a black nylon jacket and blue jeans. "[H]is eyes sinked [sic] into his head a little bit, he has a sandy brown mustache, he just looked really dirty." R. 211:131, 134-36.

Finally, the robber grabbed the money and fled. R. 211:136.

The composite

The next day, police asked Ms. Shelton to come to the Orem City police station to provide further information. She reviewed several books of photos supplied by the police, but the robber was not among them. "I would have recognized him if I would have seen him" in the photo books, she later said. R. 211:149.

She also met with Detective Barry Nielsen, who attempted to use a computer program to generate a composite photo of the robber based on Ms. Shelton's description. R. 211:161, 164.

Ms. Shelton was not pleased with the result. She said that although the composite came close to capturing the robber's distinctive eyes, the rest of the features were just "as close as I could get him to," given the limitations of the software. R. 211:177-78.

Detective Nielsen also acknowledged the limitations of the computer program. By the time of trial, he had obtained better software with a greater selection of different features that could be mixed and matched. R. 211:185-88.

The unsatisfactory composite was distributed to other law enforcement agencies, but never yielded any results. R. 211:186. When Detective Nielsen obtained new information implicating defendant, he abandoned the composite altogether. R. 211:186-87.

The photo array

Four months later, Officer Nielsen contacted Ms. Shelton to announce that he had a suspect in the robbery and that he wanted to show her some photos. R. 211:73-74. Detective Nielsen then used a computer to randomly select photos of five other men who matched defendant's characteristics. R. 211:82-84. He printed the photos on a single sheet of paper, situating them in three rows and two columns. He placed defendant's photo in the middle row, the number "4" spot. R. 211:86. A copy of the photo array is attached as Addendum A.

Before showing the photos to Ms. Shelton, he advised her that the robber may or may not be among them. He told her to look carefully at each photo and decide if she recognized any of them. He also told her not to choose anyone if she did not recognize

any of them. R.211:74. He watched as she reviewed the photos, her eyes moving back and forth from one row to the next. R. 211:101. Then, she made a selection: Number 4. *Id.*

"[W]hen I got to number four, I knew that was him," she recalled. R. 211:138-39.

Asked at trial if she picked out the subject who looked "most like the robber," Ms. Shelton made the following reply: "No, not most like. He looked exactly like." R. 211:154.

SUMMARY OF ARGUMENT

Point I: In reviewing the motion to suppress the eyewitness identification, the trial court carefully fulfilled its "gatekeeper" function by determining that the testimony of Ms. Shelton was reliable enough to be presented to the jury. In so doing, the court considered the preliminary hearing testimony of Ms. Shelton and Detective Nielsen and made appropriate findings on the record. These findings are not insufficient, not clearly erroneous and should be affirmed.

Point II: Based on those findings, the court concluded that the photo array was not unduly suggestive and that admitting Ms. Shelton's testimony would not violate defendant's right to due process. This ruling accords with well-established Utah precedent and should also be affirmed.

Point III: Defendant's claim that the State withheld allegedly exculpatory evidence fails for two main reasons. First, the composite prepared by Detective Nielsen was produced and introduced at trial and defendant's trial counsel orally waived any objec-

to any delay in producing it. Second, the claim that defendant may have been pictured in the photo books Ms. Shelton reviewed the day after the robbery, and that her failure to identify him would have been exculpatory, is mere conjecture and, as such, cannot amount to a violation of defendant's due process rights.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE EYEWITNESS IDENTIFICATION OF DEFENDANT WAS RELIABLE UNDER THE *RAMIREZ* CRITERIA.

When asked, a trial court has the responsibility to make a preliminary determination as to the reliability of eyewitness testimony before it may be admitted. *State v. Ramirez*, 817 P.2d 774, 778 (Utah 1991). In making this determination, the court considers the following factors:

> (1) [T]he opportunity of the witness to view the actor during the event;
>
> (2) the witness's degree of attention to the actor at the time of the event;
>
> (3) the witness's capacity to observe the event, including his or her physical and mental acuity;
>
> (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and
>
> (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly.

Id. at 781 (citation and quotation marks omitted).

Defendant first argues that the trial court's factual findings underlying its denial of the motion to suppress are insufficient under rule 12, Utah Rules of Criminal Procedure, because they do not focus on the *Ramirez* factors. Defendant then argues that even if the findings are sufficient, the identification was nonetheless defective under *Ramirez*. As shown below, neither argument is persuasive.

A. The Trial Court's Findings Were not Clearly Erroneous; Alternatively, If the Findings were Inadequate, the Error Was Harmless.

Defendant claims the trial court failed to make adequate factual findings and that such a failure constituted plain error. Aplt. Br. at 9. Defendant claims that the trial court's "complete statement" regarding the motion to suppress is as follows:

> I'm going to deny that motion. I have the original here, and all the reasons given regarding the dark shirt, there are two others, although their angles are a little different, but also are wearing dark shirts. The mustache is not that noticeable. In fact, the bottom right person looks like they've even taken the mustache off of him. It looks very lighter [sic] around his mouth area. The witness that testified had no hesitation when she picked out the individual. I looked at this; it does not single out any person. I had third parties look at and I said, "Tell me, does this appear – who would you pick if you wanted to from this," and they actually thought the person with the long hair was the one that was more singled out than the defendant. So I am going to deny the motion to suppress this.

Aplt. Br. at 12 (citing R. 209:2).

Preliminarily, it should be noted that defendant faces a very difficult and perhaps impossible burden in making this argument. Although defendant acknowledges that the

The court also indicated that the witness never felt pressured to pick out someone from the photo array: "In other cases I've seen that where there have been some uncertainty [sic] and it's almost like, 'Gee, I better pick on[e] of these people.' But I didn't see that in this case."

Thus, a review of the complete record shows that the trial court's factual findings concerning the motion to suppress were not insufficient. But even if the findings were inadequate, any error was harmless. Harmless error can occur, first, "if the undisputed evidence clearly establishes the factor or factors on which the findings are missing," or second, "even given controverted evidence . . . if the absent findings can reasonably be implied." *Colonial Pac. Leasing*, 1999 UT App 91 at ¶ 17; *see also Ramirez*, 817 P.2d at 787 (appellate court may "assume that the trier of fact found them in accord with its decision, and we affirm the decision if from the evidence it would be reasonable to find facts to support it").

For the most part, the evidence concerning eyewitness identification was uncontroverted. As explained above, the trial court clearly found that Ms. Shelton had ample opportunity to observe the robber's face. Defendant did not seriously dispute those prongs of the *Ramirez* test; rather, defendant's main thrust below and on appeal is to contest the propriety of the photo array, arguing that it was overly suggestive because defendant was the only person among the six pictured with a mustache and a dark shirt. R. 208:20. The record clearly shows that the trial court was mindful of these contentions

and rejected them. Findings may be implied if it is clear that the trial court must have resolved a factual question in order to reach its conclusion. As this Court has held:

> Unstated findings can be implied if it is reasonable to assume that the trial court actually considered the controverted evidence and necessarily made a finding to resolve the controversy, but simply failed to record the factual determination it made.

Colonial Pac. Leasing, 1999 UT App 91 at ¶ 18. The transcript of the August 10, 2001, hearing shows that the court had an extensive colloquy with defense counsel as to whether defendant's mustache made the photo array unduly suggestive. *See, e.g.*, R. 208:20. It is clear that the court resolved that factual issue in favor of the State, noting at several points that the witness had stated unequivocally that it was not his mustache, but his eyes that allowed her to identify him as the robber. R. 208:8, 9, 20.

The only other matter that seemed to trouble the trial court was whether the photo array was overly suggestive because defendant's photo revealed his upper chest and the black shirt, while the other photos were cropped closely around the subjects' faces. R. 208:16. For that reason, the court took the motion under advisement and requested additional briefing on that issue because "it's apparent in this case that the photo of the defendant is slightly from a different distance than the other five in the photo array." *Id.* After the State submitted a brief citing numerous cases holding that the size and shape of a photo did not taint the photo array, R. 71-75, the court denied the defendant's motion to suppress.

In sum, the trial court carefully considered the evidence presented at the preliminary hearing and made appropriate findings on the record in denying defendant's motion to suppress. The trial court's findings are either stated in the record or implicit from the court's ruling.

B. The Trial Court Correctly Denied Defendant's Motion to Suppress the Eyewitness Testimony of the Victim.

Defendant claims that the identification of defendant from the photo array and in court at his preliminary hearing was contrary to the principles enunciated in *Ramirez.* Aplt. Br. at 16-18. This argument is unpersuasive.

The due process provision of article I, section 7 of the Utah Constitution requires a two-step analysis to determine the admissibility of eyewitness identification based on a photo array. First, the trial court must examine the photo array and "the procedural actions taken by law enforcement officials in assembling and presenting a photo array to witnesses for due process . . ." *State v. Hubbard*, 2002 UT 45, ¶ 25, 48 P.3d 953. Second, the trial court must "make a preliminary determination on whether the identification is sufficiently reliable such that its admission and consideration by the jury will not violate defendant's right to due process." *Id.* This preliminary determination is part of the trial court's gatekeeper function and should not usurp the role of the jury as factfinder. As the Utah Supreme Court has stated:

> Our determination . . . is only whether the proffered evidence is sufficiently reliable such that it can be presented to the jury for their deliberation. Courts need not, nor should they, step into the province of the jury and decide the ultimate matter of

> identification for the jurors. Courts must simply decide whether the testimony was sufficiently reliable so as not to offend defendant's right to due process by permitting *clearly unreliable* identification testimony before the jury.

Id. at ¶ 30 (emphasis added).

1. The photo array was not impermissibly suggestive and did not violate defendant's due process rights.

Defendant claims that he stood out in the photo array because he was the only person with a mustache and dark shirt. R. 211:86-87. However, this claim is a quibble. Viewed in context, the photo array did not single out defendant.

In evaluating the constitutional validity of the assembly and presentation of a photo array, trial courts consider factors such as the similarities in the appearance of those pictured, the order in which they were presented and whether the presenting officer did anything to influence the witness's selection. *Hubbard*, 2002 UT 45 at ¶ 24. In *Hubbard*, the Utah Supreme Court endorsed a procedure in which all the subjects, including defendant, were similar in basic characteristics such as ethnicity. However, the court did not require the defendant's features to match perfectly with those of other subjects. "Some appear to have somewhat different skin tones, and the amount and style of facial hair differ somewhat among the photos." *Id.* Before presenting the photos, the officer advised the witness that the assailant may or may not be among them. *Id.* Of the six photos presented, "defendant's was neither the first or the last . . ." *Id.* The Supreme Court concluded that the photo array was not "impermissibly suggestive" and not likely to result in "irreparable misidentification." *Id.*

Similarly, here, the assembly and presentation of the photo array was not impermissibly suggestive. Detective Nielson testified that he compiled the photo array with a computer by searching for the following criteria: white male, 20-to-30 years old, brown hair and average build. R. 211:84, 97. He mounted the photos on a single sheet of paper configured in two columns and three rows. Defendant was situated in the middle row and identified as number "4." Detective Nielsen told Ms. Shelton that the robber may or may not be among the photos. R. 211:94. He also told her that the investigation would continue even if she did not select someone. *Id.* This procedure tracks that endorsed by the Supreme Court in *Hubbard.* Those chosen for the photo array matched defendant's ethnicity, his age and his hair color. The photos were arranged so that defendant was neither first nor last. There were, of course, differences among those pictured, but such differences are inevitable given that each individual has a unique combination of features. The bottom line, however, is that nothing in the photo array was impermissibly suggestive.

Defendant attempts to capitalize on the fact that he is the only one of the subjects with a mustache and a black shirt. These differences do not invalidate the photo array. First, defendant overstates the significance of these differences. As the trial court noted, defendant's thin, wispy "mustache" is easily missed. And while he is obviously wearing a black shirt, it is clear that others in the array are also wearing black, although their closer-cropped photos make it somewhat less apparent. Such minor differences are not fatal. *See Hubbard*, 2002 UT 45, ¶ 24 (differences in skin tone and facial hair did not

make photo array unfairly suggestive). Other courts have determined that minor differences in facial hair and clothing do not invalidate a photo array. *See, e.g., State v. Hyde,* 898 P.2d 71, 77 (Idaho App. 1995) (photo lineup not defective, even though defendant was only subject with a mustache that differed in color from his hair); *People v. Webster,* 987 P.2d 836, 839 (Colo. App. 1998) (photo array upheld, even though defendant was the only subject with "geri curls"); *People v. DeSantis*, 831 P.2d 1210, 1222 (Cal. 1992), *cert. denied* 508 U.S. 917 (1993) (photographic lineup not unduly suggestive even though perpetrator reportedly wore a red shirt and defendant was only member of the lineup with a red shirt). n sum, the photo array was not impermissibly suggestive and the trial court did not err in admitting the eyewitness testimony of Ms. Shelton.

2. The trial court properly determined that the eyewitness identification of defendant was reliable.

Defendant claims that Ms. Shelton's testimony should have been excluded under *Ramirez* because her identification of defendant was not spontaneous and her initial description of the robber was inconsistent with defendant's appearance. Aplt. Br. at 18-20. This argument is without merit.

As noted, a trial court must determine whether the eyewitness testimony is sufficiently reliable to be presented to the trier of fact. This determination is made by application of the principles enunciated by the Utah Supreme Court in *Ramirez*, 817 P.2d at 778. In *Ramirez*, defendant was convicted of aggravated assault based largely on the

eyewitness identification by one of the victims. There, two men armed with a gun and a pipe, accosted a restaurant manager and her husband and brother as the three left the building. *Id.* at 776. It was night and both robbers wore scarves that covered most of their faces. *Id.* Shortly after the robbers fled, police arrested defendant who was walking along a road a short distance from the robbery scene. *Id.* The three victims were transported to the location where defendant had been arrested to view the defendant, who was handcuffed to a chain link fence and illuminated by squad car headlights. *Id.* Two of the victims could not identify defendant as one of the assailants, but the third did identify him. *Id.*

Although acknowledging that the witness's identification of Ramirez presented an "extremely close case," the court nonetheless upheld the eyewitness identification. *Id.* at 784. Deferring to the trial court's superior position to judge the credibility of witnesses, and viewing the facts in a light favorable to the trial court's decision, the court stated: "[W]e cannot say that Wilson's testimony is legally insufficient when considered in light of the other circumstances to warrant a preliminary finding of reliability and, therefore, admissibility." *Id.*

Despite defendant's claims to the contrary, this is not "an extremely close case." Ms. Shelton testified that the encounter with defendant lasted several minutes. R. 211:136. Defendant was only four feet from her in a well-lighted room and she looked at him directly in the face 10-to-15 times. R. 211:135. He was not wearing a mask and had nothing covering his face. R. 211:135. She took special note of his eyes, which she

described as "sinked [sic] into his head." R. 211:131. In short, Ms. Shelton's ability to observe defendant clearly met all of the *Ramirez* criteria.

Defendant claims, nonetheless, that Ms. Shelton's identification was defective because it was not spontaneous or consistent. Defendant notes that while the *Ramirez* witnesses made their identification 30 minutes after the robbery, Ms. Shelton did not identify defendant until four months later. Aplt. Br. at 18. "Shelton did not immediately pick out Powell as the suspect, but 'went back and forth' looking at all the photos before she picked Powell."[3] Aplt. Br. at 21. He also points out that although Ms. Shelton initially described the robber's age as late 20s to early 30s, she acknowledged at the preliminary that defendant did not look that age. Aplt. Br. at 18.

These arguments are unavailing. The evidence introduced at the preliminary hearing and at trial shows that Ms. Shelton's testimony was spontaneous and consistent. Although Ms. Shelton did not identify defendant until four months later, that was only because she was not given the opportunity until four months later. When shown a photo array containing a picture of defendant, she immediately and spontaneously identified him as the robber. R. 211:138-39, 154. Moreover, the single inconsistency defendant identifies about his age is insignificant when compared to the overall consistency in her descriptions, as the following excerpt illustrates:

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[3] This characterization is misleading because it implies that Ms. Shelton could not make up her mind. In context, Detective Nielsen's use of the phrase "back and forth" was merely a description of how Ms. Shelton's eyes moved as she examined the photo array. R. 211:101. Ms. Shelton testified that she immediately recognized defendant as the robber. R. 211:138-39, 154

Q. [by defense counsel] And when you spoke to the officers, you described the person as being 5' 8["] about?

A. [by Ms. Shelton] Somewhere around there.

Q. You described the person as being in their late 20s or early 30s?

A. Yes.

Q. Is that right? And you said that the person had a sandy brown colored mustache; is that right?

A. Yes.

Q. You also said that the person was not overweight, just average in build and statute; is that right.

A. Yes.

Q. So that's how you described the person in January.

A. (Witness indicates in the affirmative.)

Q. The person who you picked out of the photo array or you identified today, does he look to be in his late 20s or early 30s.

A. No.

R. 207:17-18. The defense attorney did not question Ms. Shelton about any additional inconsistencies because there were none. Additionally, any discrepancies between Ms. Shelton's "initial description of her assailant and defendant's physical characteristics, . . . are primarily matters of the credibility of the witness [and] best left to the finders of fact." *State v. Nebeker*, 657 P.2d 1359, 1362 (Utah 1983).

Defendant also claims that Ms. Shelton's identification of him at the preliminary hearing was suggestive because he was "the only person wearing handcuffs, bright orange inmate clothing and the only person sitting with the defense attorney." Aplt. Br. at 19. Defendant seems to argue that the preliminary hearing identification of defendant was improper because it was tainted by the photo array. However, because the photo array was properly conducted, it could not taint subsequent identifications. Moreover, there is nothing inherently improper about identifying a suspect who displays indicia of arrest, such as handcuffs or jail clothing. In *Ramirez*, for example, the identification of the defendant passed muster even though it took place while the suspect was handcuffed to a fence and bathed in police spotlights. *Ramirez*, 817 P.2d at 784; *see also State v. Rivera*, 954 P.2d 225, 229 (Utah App. 1998) (identification admissible even though defendant was handcuffed and being held by officers).

In short, the eyewitness testimony of Ms. Shelton was properly determined to be reliable and the trial court correctly denied defendant's motion to suppress.

II. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL BASED ON THE PROSECUTION'S ALLEGED FAILURE TO PRODUCE ALLEGEDLY EXCULPATORY EVIDENCE.

Defendant claims that prosecutors should have disclosed that, the day after the robbery, Ms. Shelton reviewed several photos of possible suspects. Aplt. Br. at 25. Defendant claims that the photo books reviewed by Ms. Shelton should have been

produced because the photos would have been exculpatory *if* defendant had been pictured there and Ms. Shelton failed to identify him.

This argument, however, was squarely rejected by the Utah Supreme Court in *State v. Nebeker*, 657 P.2d 1359 (Utah 1983). There, the victim was a woman who was assaulted by a man who came to her door asking to use the phone book. The victim was shown a photo array, but did not identify any of the photos as her attacker. She was subsequently shown a second a photo array and tentatively identified her attacker. She then positively identified the defendant as the culprit during a live lineup. Defendant was convicted and on appeal claimed that his due process rights were violated because police had not maintained the first photo array. *Id.* at 1361. The *Nebeker* defendant reasoned, as does the defendant in this case, that the initial photo array would have been exculpatory *if* he had been pictured, but not identified by the victim. The Utah Supreme Court flatly rejected this argument.

> [T]he defendant was not affirmatively identified in the unpreserved array nor did the witnesses fail to identify the defendant from an array in which the defendant's photograph had been specifically placed after the investigation focused on the defendant. In light of these factors and testimony that defendant's photograph did not appear in those arrays, the Court concludes that defendant's claim is based on a *mere possibility* that the photo arrays might have affected the trial outcome and, therefore, the inability of the prosecution to reconstruct those arrays is not material in the constitutional sense.

Id. at 1364 (emphasis added).

Similarly, there was no evidence here that defendant's photo appeared in the books viewed by Ms. Shelton. In fact, the evidence at trial was just the opposite:

> Q. [by defense counsel] Do you know whether you saw a picture of Mr. Powell on that occasion?
>
> A. [by Ms. Shelton] No.
>
> Q. You don't know if –
>
> A. No, he wasn't there.
>
> Q. Do you know he wasn't in there because the police told you that or you just know because – you know that because you don't believe you picked him out?
>
> A. And I know because I would have recognized him if I would have seen him.

R. 211:149. In light of this testimony, and the complete lack of evidence to the contrary, defendant's argument consists of the "mere possibility" that the original photo array might have contained exculpatory evidence.[4] Because a mere possibility cannot establish a due process violation, defendant's argument fails. *See Nebeker*, 657 P.2d at 1364.

Finally, defendant argues that a police composite sketch prepared by Detective Nielsen shortly after the robbery was also exculpatory and should also have been provided to the defense. This argument fails, first, because it was affirmatively waived. After obtaining a copy of the composite from the State, defendant's trial counsel stated:

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[4] The only suggestion defendant offers to support his claim is that, upon review of the photo books following trial, "[t]here were several pages with spaces where photos may have previously been placed but were now missing . . ." Aplt. Br. at 25. Such speculation demonstrates nothing and should be rejected out of hand.

"I don't have a problem with the notice requirement since we have it [the composite] here today and we have it now, but I think it is potentially exculpatory and I want it introduced." R. 211: 165-66. Because defendant affirmatively waived any objection to the late production of the composite, he cannot raise the issue on appeal even under a plain error standard. *See, e.g., Perdue*, 813 P.2d at 1206 ("The doctrine of invited error 'prohibits a party from setting up an error at trial and then complaining of it on appeal'") (citation omitted); *see also State v. Bullock*, 791 P.2d 155, 158 (Utah 1989) ("[I]f trial counsel's action amounted to an active, as opposed to a passive, waiver of an objection, we may decline to consider the claim of plain error"); *State v. Ellifritz*, 835 P.2d 170, 174 (Utah App.1992) ("[W]hen counsel makes a 'conscious decision to refrain from objecting,' we may decline to consider an argument of plain error") (citation omitted).

Second, even if this argument had not been waived, it still fails simply because the composite *was* produced at trial and used by defendant. As the Utah Supreme Court has stated, the nondisclosure of potentially exculpatory evidence "violates due process under *Brady*[5] only if the evidence at issue is material and exculpatory, and if the defense did not become aware of the evidence until after trial." *State v. Bisner*, 2001 UT 99, ¶ 36, 37 P.3d 1073. Defendant became aware of the composite during Ms. Shelton's testimony and was presented a copy during a break. R. 211:161. When the trial resumed, defendant cross-examined both Ms. Shelton and Detective Nielsen about how the composite was prepared and why it had not been provided to the defense earlier. R. 211:180-83, 187-88.

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[5]*Brady v. Maryland*, 373 U.S. 83 (1963).

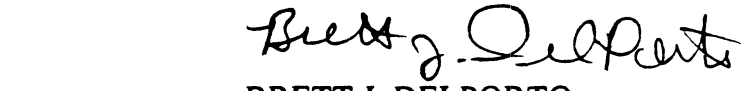
In closing, defendant argued to the jury that the composite did not resemble the defendant and that the discrepancy indicated Ms. Shelton had identified the wrong person. R. 211:212-13. Thus, the record shows clearly that defendant had ample opportunity to use the composite as part of the effort to prove his innocence. Although defendant now claims that the composite should have been produced before trial, he has not demonstrated that he suffered any prejudice by receiving it at trial. Absent such a showing, defendant has not demonstrated a due process violation.

CONCLUSION[6]

For the foregoing reasons, the State respectfully requests that defendant's conviction be affirmed.

RESPECTFULLY SUBMITTED this 9th day of December, 2002.

MARK L. SHURTLEFF
Attorney General



BRETT J. DELPORTO
Assistant Attorney General

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[6] Defendant also argues, on the final page of his brief, that his conviction should be reversed because of cumulative error. Because the State has demonstrated that the trial court committed no errors, there can be no cumulative error.

CERTIFICATE OF MAILING

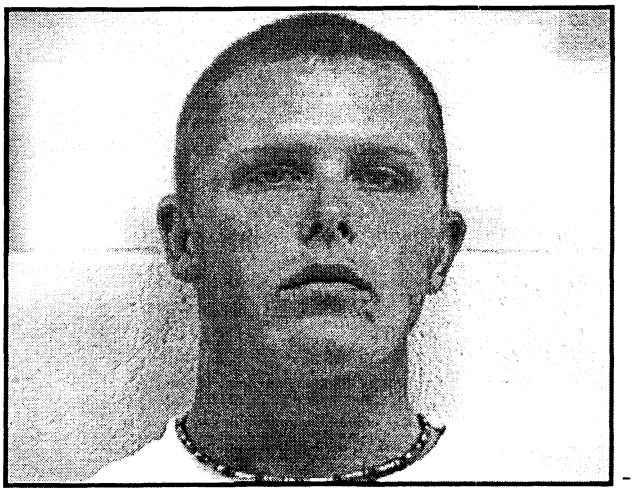
I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, 9th day of December, 2002 to:

MARGARET P. LINDSAY
Aldrich, Nelson, Weight & Esplin
P.O. Box "L"
Provo, Utah 84603-4912

Counsel for Appellant

Addendum A

Orem Dept. of Public Safety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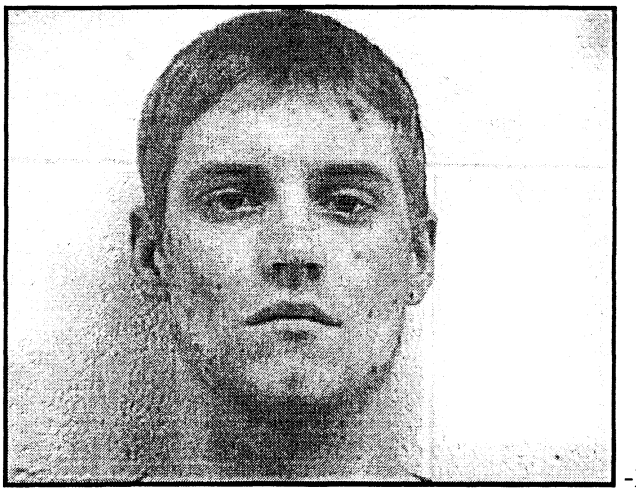
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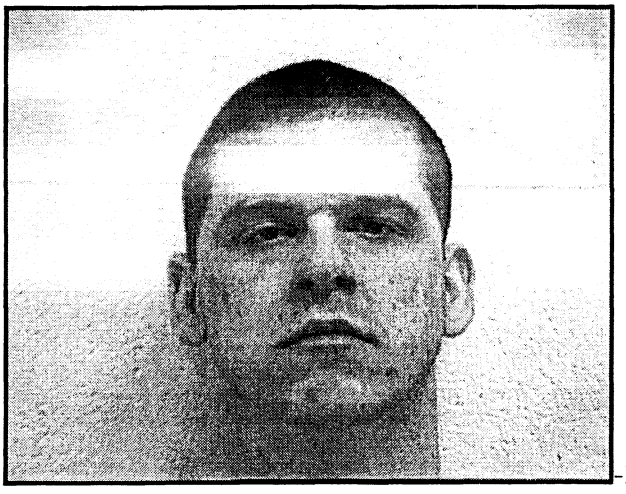
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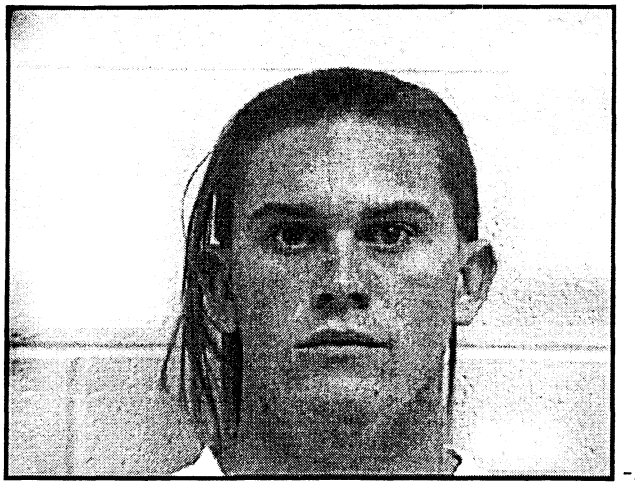
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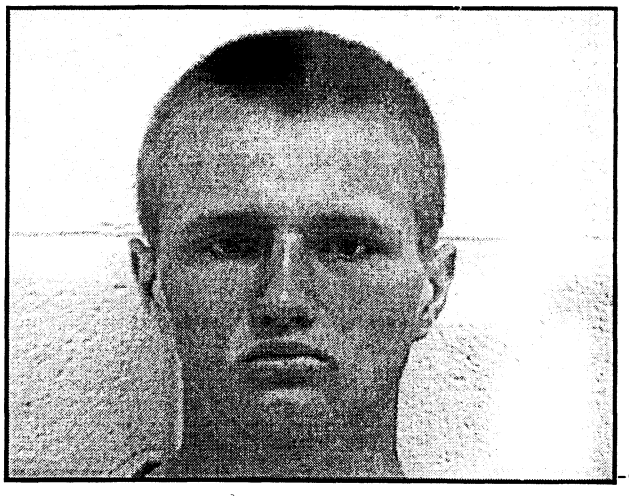
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OFFICER: *Det. Barry Nielsen - 01-00930* WITNESS: Kelley Nielsen DATE: 5/9/01

NUMBER: 4

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[redacted]

this Court reviews his claim under a plain error standard, Aplt. Br. at 1, the record seems to indicate that this argument is not only unpreserved but affirmatively waived. When a question concerning the court's findings on the motion to suppress came up at trial, trial counsel and the judge had the following exchange:

> MR. GALE [defense counsel]: I think it was an oral ruling that you made from the bench.
>
> THE COURT: There was no question though about what I said is there?
>
> MR. GALE: No, there is not.

R. 211:168. Because defendant approved the findings, he cannot on appeal complain that they were inadequate. *See State v. Perdue*, 813 P.2d 1201, 1206 (Utah App. 1991) ("The doctrine of invited error 'prohibits a party from setting up an error at trial and then complaining of it on appeal'") (citation omitted). Accordingly, this argument should be considered.

Even if defendant did not affirmatively waive the objection, his argument still fails because he mistakenly focuses exclusively on a single excerpt from the transcript of the August 22, 2001, pre-trial conference in which the trial court summarized its ruling on defendant's motion. *Id.* at 12; R. 209:2.[2] The court made additional findings on the

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[2] Although defendant does not explicitly argue that the trial court's findings should have been written, he nonetheless cites to *State v. Labrum*, 925 P.2d 937, 941 (Utah 1996), a case in which the Utah Supreme Court held that failure to enter written findings concerning the gang enhancement provision of Utah Code Ann. § 76-3-203.1 (1999) was plain error. That case is readily distinguishable because the statute cited requires written findings. Here, by contrast, the findings must be on the record, but not necessarily written. *See, e.g., State v. Pecht*, 2002 UT 41, ¶ 34, 48 P.3d 931

record during the August 10, 2001, pre-trial conference, in which the court heard arguments concerning defendant's motion to suppress. R. 208. Reviewing other portions of the record to discern the trial court's findings is entirely appropriate. As this Court has stated: "'In assessing the sufficiency of the findings . . . we are not confined to the contents of a particular document entitled 'Findings;' rather, the findings may be expressed orally from the bench or contained in other documents." *Colonial Pac. Leasing Corp. v. J.W.C.J.R. Corp.*, 1999 UT App 91, ¶ 28, n.6, 977 P.2d 541.

A review of the transcript of the August 10, 2001, hearing demonstrates the trial court's careful application of the *Ramirez* factors in weighing defendant's motion to suppress. For example, the court commented during the hearing that Ms. Shelton had ample opportunity to observe the assailant during the robbery – findings which satisfy the first three *Ramirez* factors. The court noted:

> As to that aspect, this witness [Ms. Shelton] seemed to be very clear. She did have an opportunity to observe him for a significant amount of time. She did observe him. She was frightened. She didn't know if he was going to use a weapon or not, and she wasn't looking even at the money she was putting up on the counter, she was looking at him, whoever her assailant was.

R. 208:14. Similarly, when choosing defendant from the photo array, "[s]he didn't hesitate, or she didn't say, 'Well, it's either this person or this person. She – [identified] . . . a photo right away." R. 208:19. This comment shows that the court found the witness's identification was made spontaneously, this satisfying another *Ramirez* factor.